United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4132

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FOR THE SECOND CIRCUIT

No. 75-4132

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

against

THE FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

THE WESTERN UNION TELEGRAPH COMPANY,
STATE OF HAWAII and ITT WORLD COMMUNICATIONS INC.,
Intervenors.

PETITION FOR REVIEW OF A MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF INTERVENOR THE WESTERN UNION TELEGRAPH COMPANY

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Statement of Issue

Section 222(c)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.* (the "Communications Act") provides that:

> "[a]ny proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger . . ."

In 1943, The Western Union Telegraph Company (the "Telegraph Company") and Postal Telegraph, Inc. ("Postal Telegraph") were merged, and in due course the surviving company, the Telegraph Company, effected the required divestiture and thereby complied with Section 222(c)(2). In 1970, the Telegraph Company and the United States Postal Service initiated a new service, "Mailgram" (described *infra* pp. 11-12), within the continental United States. The question presented in this Review Proceeding is whether Section 222(c)(2), having been fully implemented in connection with the 1943 merger, now operates to bar the Federal Communications Commission (the "FCC") from entertaining the Telegraph Company's application under Section 214 for authority to provide Mailgram service between Hawaii (an international point for purposes of Section 222) and the continental United States.

Statement of the Case and Proceedings Below

This proceeding is before the Court on a Petition for Review (the "Review Proceeding") of a Memorandum Opinion and Order issued by the FCC on June 23, 1975 which held that Section 222(c)(2) does not deprive the FCC of jurisdiction to consider the Telegraph Company's Hawaii Mailgram application on the merits. The FCC's determination is being challenged here by Petitioner, Western Union International, Inc. ("WUI"), and intervenor ITT World Communications Inc. ("ITT"), who, desiring to capitalize on the Telegraph Company's successful development of the new Mailgram services are, among others, applicants before the FCC to provide a service to Hawaii similar to Mailgram (A20).

It will be shown in this Brief that the result reached by the FCC in its Memorandum Order and Opinion should be affirmed. Section 222(c)(2) of the Communications Act

(the "divestment provision") expressly limits the divestment requirement to those international telegraph operations "theretofore carried on" by the Telegraph Company as of 1943. Since Mailgram is a new and unique service, initiated experimentally by the Telegraph Company in 1970, the divestment provision in no way applies to this service. Furthermore, regardless of the types of service to which it applies, Section 222(c)(2) requires only the divestment of certain services carried on prior to any merger thereunder, and does not purport to place any limitation whatever on the Telegraph Company's activites subsequent to the accomplishment of such divestment. The divestment provision, therefore, was not intended to limit the FCC's broad authority to allow the Telegraph Company to compete internationally following its divestment of its international telegram facilities if the FCC should find such competition to be in the public interest.

A. Historical Background and Structure of Industry

Before discussing the FCC's disposition of this case, we will look briefly at the events which led to the enactment of Section 222, in order that the issue herein be brought into sharper focus.

Prior to the enactment of Section 222, there were three principal carriers providing domestic telegraph services: the Telegraph Company, the largest of the three, and Postal Telegraph, the third largest, both handled domestic telegrams, *i.e.*, Public Message Service ("PMS")[1] (S. Rep. No. 769, 77th Cong. 1st Sess. at 17-18 (1941)). The second largest telegraph carrier was American Telephone and Telegraph Company ("AT&T"), which competed with the

1. "PMS" is the FCC's abbreviation for traditional telegram service (A13). This reference and all further such references in this Brief to pages beginning with the letter "A" are to pages in the Appendix.

Telegraph Company's and Postal Telegraph's domestic PMS by offering a wide variety of leased wire and teletypewriter exchange ("TWX") services as well as telephone service (*Id.*).[2]

Postal Telegraph by 1943 was in dire financial condition (H.R. Rep. No. 2664, 77th Cong., 2d Sess. at 3-4 (1942)). Although it had once been reorganized, and although as of 1942 the Government through the Reconstruction Finance Corporation had advanced more than $8,000,000 to enable Postal Telegraph to operate, Postal Telegraph continued to lose money (*Id.*). The seriousness of this problem was exacerbated by the fact that the country was involved in World War II which necessitated a sound and efficient communications system (S. Rep. No. 1490, 77th Cong., 2d Sess. at 1 (1942)). Congress reviewed the alternative actions available to it. It rejected both the continuation of subsidies to Postal Telegraph and government takeover of the company as inimical to the free enterprise system. Consequently, concluding that a merger or consolidation of Postal Telegraph and the Telegraph Company was the most viable alternative, Congress amended the Communications Act by enacting Section 222 to permit such a merger.

Congress recognized that the Postal merger would not result in a domestic communications monopoly for the Telegraph Company (*See* H.R. Rep. No. 69, 78th Cong., 1st Sess. at 3 (1943); H.R. Rep. No. 2664, 77th Cong., 2d Sess. at 4 (1942); S. Rep. No. 1490, 77th Cong., 2d Sess. at 2 (1942)), and that, even after its merger with Postal Telegraph, the Telegraph Company would face sharp and effective competition from both telephone and mail service, the use of which had greatly increased by 1943 (*See, e.g.* H.R. Rep. No. 69, 78th Cong., 1st Sess. at 3 (1943)). Congress

2. At that time there also existed two radio telegraph carriers that maintained offices for pick-up and delivery of telegrams in several major cities (A41).

also included, in Section 222(a)(5), a provision whereby the International Record Carriers (the "IRCs"),[3] upon FCC approval, could perform all domestic functions for international telegraph messages in locations within the United States designated by the FCC as "gateways".[4]

As appears from *International Record Carriers' Communications*, F.C.C. 76-174 at ¶3 n.1 (February 26, 1976), WUI, ITT and RCA presently pick-up and deliver international telegraph messages, in full competition with the Telegraph Company, in the gateways of New York City, San Francisco and Washington, D.C.;[5] and TRT Telecommunications, Inc. ("TRT") presently operates in the gateways of Miami and New Orleans. Moreover, the FCC

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3. An "IRC" is defined by Section 222(a)(3) of the Communications Act as:

> "Any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier."

Today, the three largest IRCs are WUI, ITT and RCA Global Communications, Inc. ("RCA"). WUI is a corporation formed in 1963 to acquire the Telegraph Company's international cable system and is in no way affiliated with the Telegraph Company (*See Application for Merger of The Western Union Telegraph Co. & Postal Telegraph, Inc.*, 30 F.C.C. 323, 326 (1961)).

4. A "gateway" is a term of art designating any place within the continental United States where the IRCs can accept and deliver international telegraph messages. The authority for such activity is found in Section 222(a)(5) which excepts from the definition of "domestic telegraph operations" the acceptance and delivery of international telegraph messages

> " . . . in the cities which constitute gateways approved by the Commission [the FCC] as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States."

The "hinterland", on the other hand, refers to any place in the United States other than those areas designated as gateways.

5. These IRCs also provide leased-channel services in the Miami gateway.

has recently announced a policy encouraging applications by all of the IRCs to provide all of their authorized services in each of the five present gateways (*See id.*, F.C.C. 76-174 at ¶9). And, by letter orders dated March 29, 1976, the FCC effectuated this policy by granting special temporary authority to WUI, ITT, RCA and TRT.

The IRCs are now attempting to expand their domestic competition with the Telegraph Company by increasing the number of gateways (*See id.*, F.C.C. 76-174 at ¶3). WUI, ITT, RCA and TRT, respectively, have requested authorization to provide PMS and other services in 20, 13, 18, and 16 additional cities in the present hinterland (*See id.*, F.C.C. 76-174 at ¶3).

Thus, under the gateways provision, the IRCs have in the past competed, presently compete, and are attempting to compete even more in the future, with the Telegraph Company for a major portion of the domestic handling of all international traffic.

Furthermore, the FCC has held that, at least in one respect, the Telegraph Company is open to competition by the IRCs in the hinterland even without an expansion of the gateways. Under a practice known as "paid direct access", a hinterland customer presently can forward outbound messages directly to an IRC by telephone, TWX terminal or otherwise, and, on instructions by the customer, overseas inbound messages can be delivered directly to the hinterland by the same means (*International Record Carriers' Communications*, 38 F.C.C.2d 543, 545 (1972); *All America Cables & Radio, Inc.*, 15 F.C.C. 293, 294 (1950)). In *International Record Carriers' Communications, supra,* the FCC allowed this competition with the Telegraph Company on the theory that the Telegraph Company has no monopoly over the handling of telegraph traffic in the hinterland (38 F.C.C.2d at 547). In fact, such competition was recognized by the FCC as quite effective:

> "[A]n increasing amount of international telegraph message traffic is specifically routed via a par-

> ticular international carrier, including messages filed directly with such carrier by hinterland users, and this trend is expected to continue in the years ahead." (38 F.C.C.2d at 546)[6]

After passage of Section 222, the Telegraph Company and Postal Telegraph were permitted to merge, and, in accordance with Section 222(c)(2) and the FCC order approving the merger, the Telegraph Company began immediately to attempt to divest its international PMS facilities. Finally, after extensive effort by the Telegraph Company to find an acceptable buyer,[7] the FCC approved an agreement with American Securities Corporation for divestment of the Telegraph Company's international cable system to a newly formed corporation, WUI (*Application for Merger of The Western Union Telegraph Co. & Postal Telegraph,*

6. Under "paid direct access" a customer must presently pay for the cost of sending the message to the gateway in addition to paying the international telegram rate. WUI, ITT, RCA and TRT, however, have all applied to the FCC for authority to absorb the cost of transmitting the messages to the gateways (*International Record Carriers' Communications*, 40 F.C.C.2d 1082, 1083 (1973)). The FCC held that this attempted expansion of paid direct access would make the distinction between gateways and the hinterland meaningless in regard to international telegraph traffic (40 F.C.C.2d at 1086). The IRCs, therefore, were required to file applications to expand their gateways in order to absorb these charges. Significantly, however, the FCC also held that it had authority under Section 222(a)(5) to consider these applications (40 F.C.C.2d at 1086-087). If these applications were to be approved, the distinction between the Telegraph Company's and the IRCs' domestic handling of international traffic would be even further limited.

7. The Telegraph Company's divestment was complicated and necessarily delayed by the existence of many agreements which the Telegraph Company had with foreign agencies and entities for the provision of telegram service to the areas of such agencies and entities. Congress, therefore, did not require immediate divestment, but rather required divestment only "as soon as the legal obligations, if any, of the carriers to be so divested will permit", provided only that the Telegraph Company use due diligence in bringing about divestment. (Communications Act, §222(c)(2))

Inc., 35 F.C.C. 233 (1963); 34 F.C.C. 922 (1963); 32 F.C.C. 441 (1962); 30 F.C.C. 951 (1961); 30 F.C.C. 323 (1961)).

B. The Procedings Below

On April 4, 1972, the Telegraph Company filed with the FCC an application for authority pursuant to Section 214 of the Communications Act to lease and to operate facilities between the forty-eight contiguous states of the United States and the State of Hawaii for the purpose of providing to Hawaii its then relatively new Mailgram service (A71-A103). This application was made by the Telegraph Company, not only in its own interest, but also because of the substantial interest of Hawaii's citizens in the availability of Mailgram service on a basis commensurate with that in the other states of the Union (See the Telegraph Company's Mailgram Application at A89-A92; Letters of Congresswoman Patsy T. Mink at A271 & A273).

Following an initial refusal by the FCC Staff to accept the Telegraph Company's Hawaii Mailgram application for filing,[8] the FCC in its Memorandum Opinion and Order of June 23, 1975, noting that the issue was one of first impression (A16-A17), held that it had authority to consider the merits of the Telegraph Company's application (A7-A60).

Looking first to the language of Section 222(c)(2), the FCC found that the Telegraph Company was required to divest only those international telegraph operations which it had "theretofore carried on" as of 1943; accordingly, the divestment provision could not be read as imposing on the Telegraph Company an all-encompassing bar to future international or overseas operations (A17-A18; A21). Indeed, noting that the Telegraph Company's 1943 inter-

8. The Chief of the Common Carrier Bureau ruled that the FCC has no authority to entertain the Telegraph Company's Mailgram application because, in his view, Section 222 precludes the Telegraph Company from providing international telegraph services subsequent to the divestment required by Section 222(c)(2) (A69-A70).

national operations principally involved the traditional PMS (A21), the FCC held that Section 222(c)(2) did not apply to other communications operations and found nothing in the legislative history which abrogated this plain meaning of the statute (A32-A33). Thus, because Mailgram service was not offered by the Telegraph Company in 1943 (A21), and because the service is wholly distinguishable from telegram service, Mailgram service was held not to be within the ambit of the divestment provision (A21; A22-27).

The FCC found that Congress had not intended to apply Section 222(c)(2) to future situations, but rather was dealing with the telegraph industry in its contemporary pattern in 1943 (A44). It also found that, although Congress provided a comprehensive scheme covering the narrow situation before it, it had no intent to legislate for future situations involving different technology and service patterns, or to supersede other pertinent sections of the Communications Act (*Id.*) In fact, the FCC pointed out that, throughout the Communications Act, Congress made clear that it was not imposing strict limitations on the power of the FCC:

> "Rather [Congress] has stated broad legislative goals and given the Commission broad and flexible powers to achieve those goals in the light of changing circumstances." (A19-A20)

The FCC found that the exercise of its broad authority was fully justified in regard to the Telegraph Company's Hawaii Mailgram application. The FCC further found that the Telegraph Company had originated Mailgram service and was the sole offeror of such service; that under the Telegraph Company's management, public demand for Mailgram service had grown rapidly in the continental United States; and that the Telegraph Company had con-

tinually expanded the availability and flexibility of this service (A19; A22-A23). The FCC therefore ruled that the public interest would best be served by including the Telegraph Company among those considered as potential suppliers of this type of service to Hawaii (A18).

The FCC, after considering all of the arguments of the participants in the proceeding, also found that the Telegraph Company's Hawaii Mailgram application did not present a potential for abuse of the type with which Congress was concerned when it enacted Section 222 with its divestment provision (A21-A22; A56). Congress was concerned only with the potential abuse that might arise from the fact that the Telegraph Company, following its merger with Postal Telegraph, would, as the sole agency for the pick-up and delivery of international telegrams in the hinterland of the United States (A45), be in a position, in accepting international telegrams, to favor its own international cable division over the IRCs. In regard to the furnishing of Hawaii Mailgram service, however, the FCC found that the several competing applicants, including the Telegraph Company, are presently equally situated, and that the public interest could, in 1975, be measured without regard to the benefits or detriments attendant upon the 1943 merger (A56).

The FCC, perceiving the motivation for the IRCs' opposition to the Telegraph Company's Mailgram application, summarized as follows:

> "It is not our function to shield the IRCs from competition. Our concern in this regard is to assure that all carriers act fairly toward the public and one another. This we can do within the broad powers given us by Congress to regulate in the public interest. We see no need in this matter to pronounce sweeping prohibitions on the activities of a carrier which are not mandated by the statute and which may be detrimental to the public interest." (A56)

On July 2, 1975, WUI filed its present Petition for Review of the FCC Memorandum Opinion and Order (A1-A6). The Telegraph Company and the State of Hawaii intervened on behalf of Respondents, the FCC and the United States of America (A305-A319). ITT intervened on behalf of Petitioner (A279-A304).[9]

C. The Nature of Mailgram Service

Mailgram service is a new and unique, low cost service. On January 1, 1970, the Telegraph Company initiated the Service in the forty-eight contiguous states on an experimental basis under joint arrangements with the United States Postal Service (*Amendment to the Telegraph Company's April 4, 1972 Application to Provide Hawaii Mailgram Service* at 2 (FCC File No. I-T-C-2618, June 30, 1975)). Since that time, the Telegraph Company has been the sole telegraph carrier offering the service. From its experimental beginnings, Mailgram has developed into an important service which has found wide public acceptance. In March 1975, the monthly volume of Mailgrams exceeded two million messages (*Id.* at 3). The Telegraph Company extended Mailgram service to the State of Alaska in December, 1973, and by February, 1975 the service was made available to and from Canada (*id.*), both deemed domestic points under Section 222(a)(5).

Mailgrams are transmitted over Telegraph Company facilities to a high capacity computer, from which they are sent to terminal printer equipment located in a designated Serving Post Office near the addressee (A23). At the Serving Post Office, Mailgrams are placed into special envelopes

9. ITT did not participate in the proceedings before the FCC. In those proceedings ITT filed only one pleading (A105-A108) which on April 19, 1972 was rejected as premature by the Chief of the Common Carrier Bureau. RCA, which did participate in the FCC proceedings (A136-A156), has not intervened in this Review Proceeding.

by a postal employee and delivered to their ultimate destination by a postal carrier (A24). Normally, Mailgrams are delivered on the day following the day on which they are sent (A24), but the United States Postal Service, which bears total delivery responsibility, makes no guarantee that delivery will occur (A24; A26). As the FCC stated in its Memorandum Opinion and Order, Mailgram service may be classified as "electronic mail" which combines some aspects of traditional telegram service with those of traditional mail service into a hybrid form identical to neither (A23).

ARGUMENT

I.

The FCC Correctly Held that Section 222(c)(2) Is not A Permanent Bar to International Competition by the Telegraph Company

A. The Plain and Unambiguous Language of Section 222(c)(2) Does not Forever Bar the Telegraph Company from International Competition

The unambiguous language of Section 222(c)(2) in and of itself demonstrates the correctness of the FCC's decision that it has authority to entertain the Telegraph Company's Hawaii Mailgram application.

(1) *The FCC properly applied the "theretofore carried on" language of Section 222(c)(2).*

The language of Section 222(c)(2) required the Telegraph Company to divest only those international operations it had "theretofore carried on" in 1943, at the time of its merger with Postal Telegraph. As the FCC stated in its Memorandum Opinion and Order:

> "It is apparent from the statutory language that the divestment requirement does not impose upon

> WU [the Telegraph Company] an all-encompassing bar to future international or overseas operations. The operative language provides only that WU must divest itself of the international telegraph operations in which it had 'theretofore' engaged." (A32-A33)[10]

The FCC found that Mailgram is a new and unique service that was not "theretofore carried on" in 1943, as will be more fully shown below (*infra* pp. 27-31). Therefore, the FCC correctly held that this service is not within the ambit of the divestment provision (A33).

By applying the "theretofore carried on" language of Section 222(c)(2) in holding that it would entertain the Telegraph Company's Hawaii Mailgram application, the FCC merely followed the long-standing rules of construction that the plain language of a statute should be given significance, *see, e.g. United States* v. *Great Northern Railway Co.*, 343 U.S. 562, 575 (1952); *62 Cases of Jam* v. *United States*, 340 U.S. 593, 596 (1951); *Ex parte Collett*, 337 U.S. 55, 58 (1949); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917), and that in interpreting a statute the court should use the ordinary meaning of words. *See, e.g. 62 Cases of Jam* v. *United States*, 340 U.S. at 599-600; *Caminetti* v. *United States*, 242 U.S. at 485-86.

(2) *The language of Section 222(c)(2) requires nothing more than divestiture.*

Even aside from the "theretofore carried on" provision, the language of Section 222(c)(2) requires no more than the divestiture by the Telegraph Company of its interna-

10. FCC Commissioner Reid's concurring statement that the language of Section 222 raises questions about the legality of the Telegraph Company's Hawaii Mailgram service application (A59; WUI Brief at 10) does not apply to the issue in this Review Proceeding. Her statement referred only to the definitional provisions in Sections 222(a)(6) and (10) which establish that Hawaii is an international point for the purposes of Section 222, a fact that neither the Telegraph Company nor the FCC majority had disputed.

tional PMS operations. The divestment provision contains no prohibition whatever against future Telegraph Company competition with the IRCs, regarding those operations which it was required to divest, or regarding those services which the Telegraph Company might provide subsequent to 1943.[11] Congress could have expressly prohibited any and all future international competition by the Telegraph Company, but it deliberately chose not to do so. Rather, recognizing that Section 214 of the Communications Act barred the Telegraph Company's future re-entry into the international marketplace without the FCC's prior approval (*infra* pp. 17-18), Congress declined to write a rule for all time and chose instead to leave the matter of future international operation to the sound discretion of the agency it had created to oversee the communications industry.

The IRCs argue for reading a *broad* prohibition into Section 222(c)(2) that would restrain the Telegraph Company from all future international competition with the IRCs. But the courts generally apply a rule of *strict* construction in interpreting statutes which impose restraints on competition. *See, e.g. United States* v. *Masonite Corp.*, 316 U.S. 265, 280 (1942).

Even in an antitrust case, when a company is ordered by a court to divest itself of a particular operation, the divestment does not operate as a prospective bar to competition by the divesting company unless the court specifically so provides. *See, e.g. Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U.S. 458, 462, 472-73 (1960); *Schine Chain Theaters, Inc.* v. *United States*, 334 U.S. 110, 127, 130 (1948); *United States* v. *Crescent Amusement Co.*,

11. If the Court in this Review Proceeding agrees with the Telegraph Company that Section 222(c)(2) was intended merely as a divestment provision, it would be unnecessary for it to reach the issue of whether Mailgram Service is distinguishable from PMS carried on by the Telegraph Company in 1943.

323 U.S. 173, 186 (1944). And, in such a case, even if competition is specifically barred for an indefinite time, subsequent re-entry into the divested field is almost always allowed on a showing that trade would not thereby be restrained. *See, e.g. Crescent Amusement Co.*, 323 U.S. at 186-87; *Schine Chain Theaters, Inc.*, 334 U.S. at 127, 130.

The IRCs make no serious attempt to deal with the language of the statute. (Indeed, ITT's 45-page Brief contains not even a single reference to the language of Section 222(c)(2), the provision here in question.) Instead, the IRCs would have this Court construe Section 222 on the basis of (1) a host of improper and unpersuasive references to legislative history, and (2) the IRCs' strained and frenetic view of the underlying policy considerations. There is no need for the Court to engage in extended analysis of these various contentions. The Court should affirm the FCC in reliance upon the clear statutory language, and the well established rule that an agency's construction of its own statute is entitled to great weight. *See, e.g. United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956); *Pan American World Airways, Inc.* v. *C.A.B.*, 392 F.2d 483, 496 (D.C. Cir. 1968); *Philadelphia Television Broadcasting Co.* v. *F.C.C.*, 359 F.2d 282, 283-84 (D.C. Cir. 1966).[12]

Moreover, as we show below, the FCC's ruling also gives effect to the FCC's plenary authority to control market entry and to prohibit abuses by certificated carriers, and to the past and present competitive realities of the communications marketplace.

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12. The cases cited by WUI (WUI Brief at 11), recognize that, despite a court's responsibility to interpret statutes, an agency's interpretation is entitled to great weight. *See Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Com'n*, 390 U.S. 261, 272 (1968); *N.L.R.B.* v. *Brown*, 380 U.S. 278, 291 (1965); *American Ship Bldg. Co* v. *N.L.R.B.*, 380 U.S. 300, 318 (1965); *Truck Drivers Local No. 807* v. *N.L.R.B.*, 506 F.2d 1382, 1385 n.7 (2d Cir. 1974). Indeed, compelling evidence is required to rebut an FCC determination that it has jurisdiction over a particular matter. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968).

B. The Existence of Statutory Controls to Regulate Competition, and the Competitive Circumstances, Indicate that Section 222(c)(2) Should not Be Read as a Permanent and All-Encompassing Bar to International Competition by the Telegraph Company

(1) The existence of ample administrative and judicial controls over any abuse by the Telegraph Company in the furnishing of international service obviates any need to read into Section 222(c)(2) a complete bar to such service.

The Communications Act consists of a series of broad grants of authority under which the FCC is empowered to deal comprehensively with the complex and ever-changing circumstances in the communications industry. *See United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 172-73 (1968); *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203 (1956); *Washington Utilities & Transp. Com'n* v. *F.C.C.,* 513 F.2d 1142, 1157 (9th Cir. 1975); *GTE Service Corp.* v. *F.C.C.,* 474 F.2d 724, 730-31 (2d Cir. 1973). Thus, Section 1 of the Communications Act (47 U.S.C. §151) centralizes communication regulatory authority in the FCC

> ". . . so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ."

See also Sections 4(i) & (j) of the Communications Act (47 U.S.C. §§154 (i) & (j); *F.C.C.* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 136-38 (1940). This breadth of the Communications Act reflects the general Congressional practice of granting to administrative agencies broad powers to deal with changing circumstances. *See, e.g. Denver & Rio Grande Railroad Co.* v. *United States,* 387 U.S. 485, 492-

93 (1967) (Interstate Commerce Commission); *Niagara Mohawk Power Corp.* v. *F.P.C.*, 379 F.2d 153, 158, 160 (D.C. Cir. 1967) (Federal Power Commission).

The cases recognize that the complex and dynamic nature of the communications industry renders it impossible for Congress to provide for every future communications problem and development. There is, therefore, a need to interpret broadly the FCC's authority under the Communications Act. And, where the issue is whether the FCC has jurisdiction over a particular communications operation, its authority has been interpreted even more expansively. *See United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177 (1968); *GTE Service Corp.* v. *F.C.C.*, 474 F.2d 724, 731 (2d Cir. 1973). The FCC in its Memorandum Opinion and Order herein correctly recognized that Section 222(c)(2) should be construed as part of the broad statutory scheme:

> "[W]e must construe the provisions of Section 222 in the light of the scheme of the Act as a whole, where Congress did set forth broad guidelines and gave us ample authority and discretion to deal with evolving circumstances." (A44)

Most significantly for purposes of the present case, Congress has provided specific control mechanisms for the regulation of competition by the Telegraph Company with the IRCs. In Section 214 of the Communications Act, under which the Telegraph Company's Hawaii Mailgram application is made, Congress has mandated that no communications carrier shall extend its services unless it has first obtained from the FCC a certificate "that the present or future public convenience and necessity" requires the extension. Under the rubric of "public convenience and necessity", the FCC must determine not only whether the service would result in improved international communications, but also whether the Telegraph Company would

have an unfair competitive advantage if it were to provide service internationally (A22; A56). And, indeed, under Section 214(c), the FCC may further control any potential abuse by its power to "attach to the issuance of the certificate such terms and conditions as in its judgment" may be required.

It is, therefore, not true that, Section 222(c)(2) need be construed as a complete bar to the Telegraph Company's furnishing of international communications services in order to assure that the Telegraph Company will not re-enter international competition with the IRCs. The FCC need not permit re-entry by the Telegraph Company. Indeed, the only issue in this Review Proceeding is whether the FCC may lawfully entertain the Telegraph Company's application for Section 214 authority.[13]

The FCC's ability to regulate the Telegraph Company's international competition is not based solely on Section 214. In addition, the FCC has extensive powers under Sections 204 and 205 of the Communications Act to evaluate, and even to proscribe, unfair practices of any carrier. Thus, for example, if the FCC were to grant the Telegraph Company's Section 214 Hawaii Mailgram application but should subsequently determine that the Telegraph Company was competing unfairly in the furnishing of the service, the FCC could order that the unfair competition

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13. The relationship of Sections 214 and 222 is illustrated by a recent decision of the FCC. *International Record Carriers' Communications*, FCC 76-174 (February 26, 1976). In this decision the FCC held that Section 222 was not a bar to the IRCs' expansion of their services in the present gateways. Nevertheless, the agency pointed out that the IRCs would still have to apply for a certificate under Section 214 before the extensions of service could be authorized. FCC 76-174 at ¶33.

be rectified.[14] And under Section 4(i) of the Communications Act (47 U.S.C. § 154(i)), the FCC is empowered to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

The IRCs' contention that Section 222(c)(2) must be read as limiting the FCC's broad powers under the Communications Act,[15] completely ignores the policy of the Act

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14. Furthermore, criminal liability is provided for in Section 501 of the Communications Act for any unlawful activity for which no other punishment exists under the Act. Such punishment may include both a fine and imprisonment. Section 502 of the Communications Act also provides for punishment for violation of any rule, regulation, restriction or condition made or imposed by the FCC under the authority of the Communications Act.

15. WUI erroneously argues (WUI Brief at 16) that Section 222(c)(2) impliedly negates the authority of the FCC to permit the Telegraph Company's re-entry into the international communications field after divestment, in providing specifically for an FCC finding that the Telegraph Company's divestment be for a "consideration . . . commensurate with its value", and that it take place "as soon as [its] legal obligations . . . will permit". It is clear that these affirmative provisions in Section 222(c)(2) were included for the protection of the Telegraph Company in recognition of its pre-existing international agreements and of the danger that the statutory requirement for divestiture might place the Telegraph Company in an unfavorable bargaining position. *See Application for Merger of The Western Union Telegraph Co. & Postal Telegraph, Inc.*, 30 F.C.C. 323, 335 (1961); *Western Union Telegraph Co.*, 25 F.C.C. 35, 78 (1958), *rev'd sub nom., Western Union Telegraph Co.* v. *United States*, 267 F.2d 715 (2d Cir. 1959).

The doctrine of *expressio unius est exclusio alterius*, which WUI apparently is attempting to invoke, will not be applied by a court to negate the purpose of a statute. *See Massachusetts Trustees of Eastern Gas & Fuel Assn.* v. *United States*, 312 F.2d 214, 220 (1st Cir. 1963). As *Massachusetts Trustees* recognizes, the doctrine is merely a guide to construction which is not a substitute for a review of an act itself as a whole to discern legislative intent.

The IRCs purport to cite prior FCC opinions in support of their contention (WUI Brief at 28-30, 34-37; ITT Brief at 22-28). As the FCC convincingly established in its Memorandum Opinion and Order herein (A46-A56), its prior opinions are not inconsistent with the point that Section 222(c)(2) does not limit its broad powers under the Communications Act. In fact, the prior FCC decisions

as a whole of entrusting broad powers to the Commission, as well as the specific statutory controls in the Communications Act for the regulation of a changing industry in the light of technological and other future developments.

In addition to the controls in the Communications Act over the Telegraph Company's furnishing of international service, the antitrust laws provide a mechanism for insuring fair competition by the Telegraph Company with the IRCs. The competitive effects of each extension of international service by the Telegraph Company may, under these provisions, be evaluated administratively and judicially on an ongoing basis.

(2) The competitive circumstances in the communications industry make it unreasonable to read into Section 222(c)(2) a bar to all future international competition.

In Section 222(c)(2) Congress was dealing with the competitive situation of the telegraph industry as it existed in 1943 (A44). Its concern was that following the merger with Postal Telegraph in 1943, the Telegraph Company would operate vast international facilities (S. Rep. 769, 77th Cong., 1st Sess. at 20 (1941)), and, as the sole agent for pick-up and delivery of telegrams in the hinterland of the United States (*Id.*), might be in a position to influence customers to use the Telegraph Company's international facilities rather than those of the IRCs. Congress fully met this concern by enacting Section 222(c)(2), requiring the Telegraph Company to divest its international telegram facilities as the price of its merger with Postal Telegraph, leaving the future situation to be handled by the FCC under Section 214 and other statutory provisions.

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that are relevant to the issue in this Review Proceeding establish that Section 222 is not a complete and permanent bar to the Telegraph Company's international competition with the IRCs. *See American Satellite Corp.*, 43 F.C.C.2d 348, 353-54 (1973); *RCA Global Communications, Inc.*, 42 F.C.C.2d 774, 780 (1973); A21; A56-A57.

In the light of the present competitive situation in the domestic and international communications industry, it is unnecessary, and indeed unreasonable, to read into the divestment provision a permanent bar to the Telegraph Company's furnishing of any and all international communication services.

As is recognized in court-ordered divestment cases under the antitrust laws (*supra* pp. 14-15), the purpose of divestment is to give competition a chance to operate. *See, e.g. Ford Motor Co.* v. *United States*, 405 U.S. 562, 574-75 (1972). However, because the competitive situation can change dramatically following divestment, it would be unreasonable to bar a divesting company permanently from re-entering competition in the market that the divestiture was designed to protect. The claim of such a permanent bar, restraining all future competition is unreasonable to the point of being wholly insupportable in a situation where, as in the present case, the companies protected by the divestiture have enhanced their competitive positions subsequent to divestment.

In our case, WUI has had more than twelve years to establish its international operations and, indeed, WUI today has vast international operations. The other IRCs have also been able to expand their international operations and to develop international contacts without any international competition from Telegraph Company for the same period of time. Thus, the Telegraph Company does not today have any international competitive advantage it may have had prior to divestment. The FCC correctly ruled that it and the courts (*see supra* pp. 16-20) may today evaluate the competitive effects of an application by the Telegraph Company to furnish specific international services "without regard to benefits or detriments attendant upon the 1943 merger" (A56).[16]

16. *See infra* pp. 31-34, where it will be shown that the nature of Mailgram service, in particular, precludes an unfair competitive advantage in favor of the Telegraph Company.

Moreover, unlike the situation in 1943, the Telegraph Company today faces substantial and effective competition from the IRCs for the domestic handling of international communications.

In Section 222(a)(5) Congress authorized the FCC to establish gateways in which the IRCs could fully compete with the Telegraph Company for the domestic handling of international business. Presently, the Telegraph Company faces full competition from the IRCs for international traffic in the gateways of New York City, San Francisco, Washington, D.C., Miami and New Orleans (*see supra* pp. 4-6). Additionally, WUI, ITT, RCA and TRT are attempting to expand their domestic competition with the Telegraph Company by increasing the number of authorized gateways to 20, 13, 18, and 16 additional cities, respectively. *International Record Carriers' Communications,* F.C.C. 76-174 at ¶3 (February 26, 1976). As recently as January 19, 1976 the FCC indicated that it will permit AT&T to use its vast domestic facilities to provide an international record service known as "Dataphone" *(Inquiry into Policy To Be Followed in Future Authorization of Overseas Dataphone Services,* Report and Order, F.C.C. 76-10 (January 19, 1976)).

In fact, the Telegraph Company is open to competition by the IRCs in the hinterland without their expansion of the gateways. Under the practice above described as "paid direct access" (*see supra* pp. 6-7), the FCC has allowed this competition with the Telegraph Company on the theory that the Telegraph Company has no monopoly over the handling of telegraph traffic in the hinterland, and the FCC has found such competition to have been quite effective. *See International Record Carriers' Communications,* 38 F.C.C.2d at 546-47.

Congress enacted and amended various provisions of the Communications Act in 1943 including Sections 222 and

214, pursuant to its policy of granting broad powers to the FCC to oversee the ever changing communications industry and the competitive situation therein. Under the FCC's implementation of Section 222(a)(5) and the other provisions of the Communications Act, the competitive situation has changed drastically since 1943, as we have shown. The present competitive situation, which has evolved under the power entrusted to the FCC by Congress, makes it all the more unreasonable at this time to read into Section 222(c)(2) a complete bar to international competition by the Telegraph Company.

C. The IRCs' Purported Use of Legislative History Is Misplaced

The IRCs attempt to obscure the clear language of the divestment provision by proliferating references to purported legislative history which they claim represents the intent of Congress (WUI Brief at 18-27; ITT Brief at 15-22). Indeed, WUI further strains this effort by resort to statements made during Congressional deliberations many years after Section 222 was enacted, in a purported attempt to show an intent of Congress in 1943 to bar all future international competition by the Telegraph Company (WUI Brief at 38-43). Such use of legislative history is legally insupportable and, in any case, does not and cannot refute the plain meaning of Section 222(c)(2).

Courts properly refuse to resort to legislative history, whether contemporaneous with or subsequent to a statute's enactment, to vary the plain meaning of a statute. *See e.g. Caminetti v. United States,* 242 U.S. 470, 485 (1917); *Montgomery Charter Service, Inc.* v. *Washington Metropolitan Area Transit Com'n,* 325 F.2d 230, 232-33 (D.C. Cir. 1963). *See also Unxcelled Chem. Corp.* v. *United States,* 345 U.S. 59, 63 (1953). Such a rule is justified because the unambiguous language of a statute is, as in our case, the final and clearest expression of legislative intent.

Moreover, because of the lack of support for their position in the Committee Reports, the IRCs rely almost totally on statements by individuals. Certainly, such statements cannot be said to represent the views of Congress. Although courts do on occasion consider contemporaneous House and Senate Committee Reports to discern the meaning of an otherwise ambiguous statute, *see Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 474 (1921), it is inappropriate to give great weight to views of individuals testifying before such committees where, as in this case, the hearings and committee deliberations were held over a period of almost two years, and where the lengthy hearing transcripts related to a number of different legislative proposals, only one of which was adopted.

In none of the statements on which the IRCs rely is there clear support for their contentions. WUI relies heavily on statements by FCC Commissioners Fly and Durr (WUI Brief at 18-19) in which they were speculating on the potential for abuse which might result from the merger of Postal Telegraph and the Telegraph Company. The Commissioners were testifying, however, on the need for a formula for the distribution of telegram traffic, rather than indicating a proclivity against future competition by a merged carrier (*See Hearings Pursuant to S.2598 Before a Subcomm. of the House Committee on Interstate and Foreign Commerce*, 77th Cong., 2d Sess. at 25, 178 (1942)). Such a formula was provided for in Section 222(e) of the Communications Act.

Furthermore, both WUI and ITT rely (WUI Brief at 19; ITT Brief at 19) on testimony of individuals in connection with an earlier proposal, which was abandoned prior to the enactment of Section 222 and which would have provided for permissive mergers of international and domestic carriers, respectively (*See Hearings on S.2445 Before the Senate Committee on Interstate Commerce,*

77th Cong., 2d Sess. at 258 (1942) (Statement of Commissioner Fly); 88 Cong. Rec. 3416 (April 9, 1942) (Statement of Senator White)). Whatever the purport of these statements, they have no bearing on the statute which was eventually enacted. Indeed, the fact that Congress dropped the provision on mergers of international carriers from the legislation clearly indicates an intent not to separate totally the operations of the domestic and international carriers.

ITT's reliance (ITT Brief at 21) on a statement made by Senator McFarland in bringing the final conference report before the Senate, if anything, supports the Telegraph Company's position. The Senator stated that Section 222(c)(2) provided for divestment of only those operations the Telegraph Company *"was carrying on"* (*See* 89 Cong. Rec. 1092, February 18, 1943 (emphasis added)).

Finally, the language quoted by WUI (WUI Brief at 18) from the *"FCC Report on the Telegraph Industry,"* Part 2, *Hearings Pursuant to S. Res. 95 Before a Subcomm. of the Senate Committee on Interstate Commerce,* 77th Cong. 1st Sess. at 475 (1941), offers little support for WUI's argument that Section 222(c)(2) forever bars international competition by the Telegraph Company. The Senate Committee, which considered the language, rejected the FCC proposal embodied in its Report (S. Rep. 769, 77th Cong. 1st Sess. at 4, 25 (1941)).[17] See also *Hearings Pursuant to S.2598 Before a Subcomm. of the House Committee on Interstate and Foreign Commerce,* 77th Cong., 2d Sess. at 16 (1942) (Statement of Commissioner Fly); *Id.* at 180 (Statement Commissioner Durr), relied on by WUI (WUI Brief at 19-20) and ITT (ITT Brief at 22 n.45), which statements were rejected by the House Committee that considered them (H.R. Rep. 2664, 77th Cong., 2d Sess. at 2, 7 (1942)).

17. WUI also argues that, contrary to the conclusion of the FCC (A17; A44), Congress intended Section 222 to cover all "problems which the telegraph industry could expect to encounter in the future due to developments and changes in the industry, as well as the problems which existed in 1943". (WUI Brief at 24) The fact of

WUI's resort to statements of individuals made to Congressional Committees many years after Congress enacted Section 222 (WUI Brief at 38-43) has even less validity, and merely serves to highlight the weakness of the entire "legislative history" argument. As the United States Supreme Court emphatically recognized in a proceeding which had originated before the FCC:

> "the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.' Rainwater v. United States, 356 U.S. 590, 593; United States v. Price, 361 U.S. 304, 313; Haynes v. United States, 390 U.S. 85, 87 n.4." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968).

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the matter, however, as ITT recognizes (ITT Brief at 8, 15), is that Congress' primary purpose for enacting the merger legislation was the failing financial condition of Postal Telegraph (*See, e.g.* H.R. Rep. No. 2664, 77th Cong., 2d Sess. at 3-4 (1942)). Secondarily, Congress wished to protect the Telegraph Company from AT&T's ever-expanding domestic operations, as is shown by the testimony of FCC Chairman Fly on which WUI relies (WUI Brief at 25). Congress, therefore, provided in Section 222(b)(1) for the Telegraph Company's acquisition of AT&T's domestic TWX system. It does not follow, however, that Congress was legislating to cover *all future problems* of the domestic telegraph industry. Indeed, such a view would be at variance with Congress' grant of broad powers to the FCC to deal with future communication problems and needs (*See supra* pp. 16-20). Moreover, it does not follow from Congress' provision in Section 222(b)(1) for the Telegraph Company's acquisition of TWX that Section 222(c)(2) encompasses operations other than PMS, as is shown by the different purposes for which the provisions were enacted. Section 222(b)(1) was enacted to strengthen the domestic competitive position of the Telegraph Company. Section 222(c)(2), on the other hand, was enacted to protect against the limited abuse that might arise due to the Telegraph Company's ownership, following its merger with Postal Telegraph, of both domestic and international PMS facilities (*See infra* pp. 31-34; *supra* pp. 20-23).

Nor is anything proved by WUI's reference to the operations which the Telegraph Company ultimately divested (WUI Brief at 12, 27). At the time of divestiture, the Telegraph Company's international telegram traffic was transmitted over its international cable system, which included cables to various foreign countries. Once these cables were divested as required by Section 222(c)(2), the Telegraph Company no longer had facilities over which to transmit other forms of telegraph service.

See also *United States* v. *Wise,* 370 U.S. 405, 411 (1962), where the Supreme Court stated that "statutes are construed by the courts with reference to the circumstances existing at the time of passage."

WUI attaches great significance to the fact that Congress did not enact the bills offered subsequent to 1943 that proposed repeal of the divestiture requirement (WUI Brief at 38-43). But, aside from the point that failure to repeal the divestment provision has no bearing on construing it as a continuing bar, it is established law that the failure of Congress to enact amending legislation is not relevant in interpreting a statute, because

> "Logically, several equally tenable inferences can be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change." *United States* v. *Wise,* 370 U.S. 405, 411 (1962).

II.

Mailgram Is a new Service Which Is Wholly Distinguishable from PMS and Which Does not Present a Potential for Abuse.

Because Section 222(c)(2) applies only to those operations which the Telegraph Company was carrying on as of 1943, the FCC considered the question whether Mailgram service fell into that category.[18] In the Memorandum Opinion and Order under review herein, the FCC found that Mailgram service is wholly distinguishable from PMS, and that Mailgram service does not present the potential for abuse with which Congress was concerned in 1943 when

18. If the Court in this Review Proceeding agrees with our position (*supra* pp. 13-15) that Section 222(c)(2) is solely a divestment provision, the Court need not reach this question.

it enacted Section 222 (A21-A27; A56). These conclusions, which are entirely correct and reasonable, involve matters within the particular expertise of the agency, and should not be disturbed by the Court. *See, e.g. Columbia Broadcasting System* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973); *F.C.C.* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946). *See also Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371-72 (1973); *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947).

A. Mailgram Service Is Wholly Distinguishable from PMS

The FCC correctly distinguished Mailgram service from PMS which the Telegraph Company was carrying on in 1943 (A22-A23). One of the greatest differences between Mailgram service and PMS lies in the manner in which Mailgrams are delivered. After Mailgrams are accepted by the Telegraph Company and transmitted over its facilities to a high capacity computer, they are sent to terminal equipment located in a designated Serving Post Office near the addressee (A23). At the Serving Post Office, Mailgrams are placed into special envelopes by a postal employee, and delivered to their ultimate destination by a postal carrier (A23-A24).

The United States Postal Service bears total responsibility for the delivery of Mailgrams (A24).[19] Therefore,

19. In an attempt to show that the United States Postal Service's involvement in the handling of Mailgrams does not differentiate Mailgram from the telegraphic services previously rendered by the Telegraph Company and the IRC's, WUI and ITT argue that such telegraphic services have sometimes involved mail delivery (WUI Brief at 32-33; ITT Brief at 33-35). For example, at page 33 of its Brief, WUI states that for some period of time fixed text greeting messages involved mail delivery. What WUI does not point out, however, is that the Telegraph Company—not the Postal Service—had the full responsibility for the delivery of messages sent under this temporary telegraphic service.

Reaching for any available straw, ITT attempts to argue that Mailgram is not a new service because a proposal had once been

Mailgram service is subject to the practices of the Postal Service, while telegrams are not (A24). Concerning telegrams, the Telegraph Company is obligated to make a first delivery attempt within five hours of its receipt or the customer is entitled to a refund of the charges (A24). On the other hand, in the case of Mailgrams, the Postal Service makes no guarantee of the date or time of delivery, or even that delivery will occur (A26).

The FCC also noted that, because of the basic difference between Mailgrams and telegrams, the charges for Mailgrams and telegrams differ substantially both as to rate levels and as to pricing practices (A26-A27).[20] The rates for a telegram are significantly higher than those for a Mailgram. In addition, because the same minimum charge applies to any Mailgram of less than one hundred words regardless of the actual number of chargeable words, the word-count function is simplified and, in many cases, eliminated. Also, for Mailgrams but not for telegrams, the name of the addressee, the address and the signature are chargeable words (A27).

The methods that a customer may use to initiate Mailgrams differ significantly from those existing in 1943 for initiating telegrams. In 1943 telegrams were typically originated by means of the customer's personal contact with Telegraph Company employees. On the other hand, a significant portion of the domestic Mailgram traffic originates from TWX or Telex terminals located in the customer's

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made that the Telegraph Company occupy space in United States Post Office facilities for the rendering of PMS (ITT Brief at 33). This proposal, which was never implemented, has no bearing whatever on the issue in this Review Proceeding.

20. The FCC opinion in *TELPAK*, 37 F.C.C. 1111, 1114 (1964), cited by WUI (WUI Brief at 33) is irrelevant to this distinction made by the FCC between PMS and Mailgrams. That opinion stated only that differences in rate levels will not distinguish services which are otherwise similar. It is nevertheless true that, where there are significant differences in two services, the difference in rate levels will usually reflect these differences and thereby be evidence of a distinction between the services.

office. The Telegraph Company, of course, did not offer the TWX-Telex service in 1943. Furthermore, Mailgrams, but not telegrams, may today be originated by submission to the Telegraph Company of specially prepared magnetic tapes and by direct computer transmission (A23 n.14). As a consequence of these new methods of origination, an increasing percentage of Mailgrams are sent directly by the customer without any personal contact with Telegraph Company employees.[21]

The difference between Mailgrams and PMS was recognized by *United Telegraph Workers, AFL-CIO* v. *F.C.C.*, 436 F.2d 920, 921 (D.C. Cir. 1970), which stated that the initiation of Mailgram service was an innovative joint undertaking by the Telegraph Company and the United States Postal Service. Thus, in rejecting an argument that the FCC did not have authority to approve Mailgram service on an experimental basis, the court stated that:

> "The Commission has a mandate under § 218 of the Act, 47 U.S.C. § 218 (1964), to inform itself of technical advancements and improvements in modes of communication so that 'the benefits of new inventions and developments may be made available to the people of the United States.' This expression of congressional desire that the Commission encourage technological innovation requires us to command a compelling showing of legislative prohibition before we strike down an experiment such as Mailgram which is designed to furnish the informational input which makes such innovation possible." (436 F.2d at 923-24.)

Furthermore, the court agreed with the Telegraph Company and the FCC that Mailgram should be treated as a

21. In 1974, for example, less than 50% of the Telegraph Company's Mailgram revenues were generated by over-the-counter and phone originated Mailgrams (*The Western Union Telegraph Company Annual Report for 1974* at 8-9). *See also International Record Carriers' Communications,* 38 F.C.C.2d 543, 546 (1972).

new service for which a tariff had to be filed under Section 204 of the Communications Act.[22]

B. Mailgram Does not Present the Potential for Abuse with Which Congress Was Concerned in 1943

Not only is Mailgram a new service, but, as the FCC found, after considering its prior opinions[23] and all of the arguments presented to it by the parties participating in the proceeding below, the service does not present a potential for abuse of the type with which Congress was concerned when it enacted Section 222 in 1943 (A21-A22; A45; A56).[24] In this regard the FCC noted that all carriers who

22. WUI and ITT both attempt to show that, because the court held that the furnishing of Mailgram service within the United States did not constitute a "new line" or "channel of communication" within Section 214, Mailgram is not a new service (WUI Brief at 30-32; ITT Brief at 32-33). Section 214 did not apply simply because the Telegraph Company did not have to construct a substantial amount of new facilities for the provision of domestic Mailgram service (Communications Act, § 214). Whether new facilities have to be constructed is not relevant to the question of whether the service is distinguishable from telegram service. Indeed, the absurdity of WUI's and ITT's argument is illustrated by the fact that this present Review Proceeding arose out of a Section 214 application by the Telegraph Company. WUI and ITT, however, have not even suggested that Section 214 is an improper section under which to bring the Hawaii Mailgram application.

23. As the FCC recognized (A46-A56), to the extent that its prior opinions discussed a potential for abuse following the merger of the Telegraph Company and Postal Telegraph, they did so only in relation to the Telegraph Company's pick-up and delivery of telegrams. *See Telegraph Service with Hawaii*, 28 F.C.C. 599 (1960); *Western Union Telegraph Co.*, 25 F.C.C. 35, 58-71 (1958), *rev'd sub nom., Western Union Telegraph Co.* v. *United States*, 267 F.2d 715 (2d Cir. 1959). These discussions, therefore, have no bearing on an evaluation of a potential for abuse in regard to Mailgram service, which did not even exist at the time of these decisions.

24. The FCC even considered an unauthorized pleading by WUI in the interest of having before it a full exposition of the views of the interested parties (A14 n. 5).

ITT did not participate in the proceedings before the FCC, but now attacks the FCC Memorandum Opinion and Order for failure fully to consider all of the issues. However, the FCC's full con-

had made application to provide Hawaii Mailgram service were equally situated, so that the public interest, in 1975, could be considered without regard to the benefits or detriments attendant upon the 1943 merger (A56). This finding by the FCC is completely justified by the nature of Mailgrams and by the broad powers granted by Congress to the FCC.

In 1943 Congress was concerned that following the merger with Postal Telegraph, the Telegraph Company would not only have international telegram facilities, but in addition would operate the only facilities in the hinterland for picking up and delivering international telegrams (A45). Thus, Congress feared that the Telegraph Company, in accepting international telegrams, might influence customers to use Telegraph Company international facilities rather than those of the IRCs.

WUI and ITT erroneously assert that the same potential for abuse presently exists for Mailgrams (WUI Brief at 21-22, 34-35; ITT Brief at 30-32, 37-38). In their view, the Telegraph Company would favor its own facilities over those of other carriers who might be authorized to provide a similar service.[25] Such an assertion completely overlooks

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sideration of the possibility of a potential for abuse negates ITT's assertion (ITT Brief at 30-31 & n. 51) that the FCC did no consider the purpose for which Section 222(c)(2) was enacted. In any case, Section 214 of the Communications Act presents an adequate forum for further consideration of the issue of potential abuses when the FCC considers the public convenience and necessity in comparatively evaluating the various applications before it.

Nor, as WUI suggests (WUI Brief at 2, 21), is an evidentiary hearing required where the FCC is considering general characteristics of the communications industry as in this proceeding. *See Bell Telephone Company of Pennsylvania* v. *F.C.C.*, 503 F.2d 1250, 1266-68 (3d Cir. 1974); *WBEN, Inc.* v. *United States*, 396 F.2d 601, 618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968).

25. WUI, in addition, asserts that, even if the Telegraph Company is the sole provider of Hawaii Mailgram service, its personnel could divert public message traffic to Mailgram traffic (WUI Brief at 22). This assertion involves essentially the same considerations as, and is just as fallacious as, its claim of potential for abuse if carriers in addition to the Telegraph Company are authorized to

the differences in the manner in which Mailgrams and telegrams are originated.

In addition to origination over-the-counter and by telephone, Mailgrams sent from the United States to Hawaii will originate from customer operated Telex, TWX and INFOCOM services as well as from customer prepared magnetic tapes (A72). If Hawaii Mailgram origination follows the present trend of domestic Mailgrams (*see supra* p. 30 n.21), most Mailgrams transmitted from the United States Mainland to Hawaii will originate without any contact between the customer and Telegraph Company employees. To the extent that such Mailgrams are filed by telephone or over-the-counter, the FCC will be in a much better position to police this minimal contact than it was in 1943 when it was the general practice to file telegram messages by Telegraph Company-customer contact.

As the FCC found, the simple answer to all conjecture as to possible abuses lies in the broad powers granted to the FCC in the Communications Act, which enable it to evaluate and to control whatever abuses might be presented by the Telegraph Company's Hawaii Mailgram service (A22; A56). Thus, when the FCC considers the merits of the Telegraph Company's present application under Section 214, it will more fully evaluate the competitive fairness of, as well as the need for, the Telegraph Company's provision of Hawaii Mailgram service (*See supra* pp. 16-18). Moreover, if the FCC were to grant the Section 214 application, it has ample authority to control any abuses that might subsequently appear (*See supra* pp. 18-20). See also *United States Transmission Systems, Inc.*, 48 F.C.C.2d 859 (1974), in which the FCC reached the same

provide Mailgram service. In fact, it is interesting that, despite the fact that Mailgram is a service conceived and developed by the Telegraph Company, WUI feels it would be abused if the Telegraph Company's Mailgram service is allowed to compete with those services offered by WUI. The Telegraph Company, of course, intends to compete fairly in its furnishing of Mailgram service to Hawaii.

conclusion in considering the potential for abuse presented by an application of an ITT affiliate to provide specialized domestic communications services.

III.

ITT Inappropriately Raises an Antitrust Issue, Which, in any Case, Is Wholly Lacking in Merit

ITT asserts that the Telegraph Company's proposed Mailgram service to Hawaii should be barred as in violation of the antitrust laws and of Section 314 of the Communications Act (ITT Brief at 39-45). This assertion should be dismissed out of hand by the Court because these issues were not raised before the FCC and because the FCC has primary jurisdiction to consider them. In any event, ITT's claims are frivolous.

A. Failure to Raise the Antitrust Issue Before the FCC Bars Its Consideration in this Review Proceeding

Section 405 of the Communications Act bars judicial review of the antitrust and Section 314 issues raised by ITT in its Brief because ITT

> "(1) was not a party to the proceedings resulting in [the] order . . . [and] (2) relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass."[26]

26. The only mention of an antitrust issue in the many pleadings before the FCC in the proceedings below was a passing reference by WUI that an antitrust issue might be raised by the Telegraph Company's Hawaii Mailgram service, an issue which WUI asserted was settled by Congress in Section 222 (A203-A204). Indeed, WUI represented to the Commission that the sole issue before the FCC was whether Section 222 excluded the Telegraph Company from international operations (A160). It is, therefore, not surprising that the FCC in characterizing WUI's arguments and the issue before it did not consider that WUI had raised an antitrust issue (A11-A12; A14). This court should refuse to pass on legal and factual questions which have not been briefed by any of the parties below or considered by the FCC as the administrative agency having original jurisdiction in this case.

The courts are in accord on the rule that, where an issue is not clearly raised before the FCC, the reviewing court will not hear the issue on a Petition for Review. *See, e.g. Columbia Broadcasting Coalition* v. *F.C.C.*, 505 F.2d 320, 326 & n.17 (D.C. Cir. 1974); *Neckritz* v. *F.C.C.*, 502 F.2d 411, 417 (D.C. Cir. 1974). *See also Gross* v. *F.C.C.*, 480 F.2d 1288, 1290 n.5 (2d Cir. 1973); *Cornell University* v. *United States*, 427 F.2d 680, 684 (2d Cir. 1970); *Conley Electronics Corp.* v. *F.C.C.*, 394 F.2d 620, 624 (10th Cir.), *cert. denied*, 393 U.S. 858 (1968).

Furthermore, the FCC has primary jurisdiction to consider the antitrust and Section 314 arguments raised by ITT. *See United States* v. *Radio Corp. of America*, 358 U.S. 334, 348-49 (1959); *Industrial Communications Systems, Inc.* v. *Pacific Telephone & Telegraph Co.*, 505 F.2d 152, 156-58 (9th Cir. 1974). In situations, where, as here, an agency has extensive authority and control over a carrier alleged to have violated the antitrust laws, application of the doctrine of primary jurisdiction is particularly appropriate because the agency's

> ". . . review of the nature of the market, the quality of present . . . service, the competitive impact of defendant's entry into the market, and various other issues would be an invaluable aid . . ." *Industrial Communications Systems, Inc.* v. *Pacific Telephone & Telegraph Co.*, 505 F.2d 152, 157 (9th Cir. 1974).

B. The Antitrust Issue Attempted To Be Raised by ITT Is Frivolous

Not only is the antitrust issue improperly raised by ITT, but, in addition, the claim is so lacking in merit that ITT has given it no serious support. It should constantly be borne in mind that the extent and nature of FCC regulation of the Telegraph Company under the Communication Act is an important factor to be considered in weighing alleged antitrust violations by a carrier subject to

FCC jurisdiction. *See, e.g. F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 92-93, 98 (1953).[27]

ITT asserts that the Telegraph Company's furnishing of Mailgram service to Hawaii would constitute a violation of Section 2 of the Sherman Act (15 U.S.C. § 2). Yet, despite the fact that a Section 2 violation is one of the most difficult antitrust violations to prove because of the complex factual questions involved, ITT offers absolutely no factual evidence to support its claim. Thus, ITT has wholly failed to sustain the burden of proof imposed on it with respect to this alleged antitrust issue. *See, e.g. United States* v. *E. I. DuPont DeNemours & Co.*, 351 U.S. 377, 381 (1956). Nor has ITT offered any evidence that the Telegraph Company's furnishing of Hawaii Mailgram service will "substantially lessen competition", "restrain trade" or "create a monopoly" as set forth in Section 314 of the Communications Act.

In order to establish a Sherman Act Section 2 case, ITT must prove either the existence of an illegal monopoly, an attempt to monopolize, or a conspiracy to monopolize. *See, e.g. Walker Distributing Co.* v. *Lucky Lager Brewing Co.*, 323 F.2d 1, 9 (9th Cir. 1963). Clearly, no conspiracy to monopolize is even alleged, since ITT claims that only the Telegraph Company is involved in the Section 2 violation.

Nor has a monopoly prohibited by Section 2 of the Sherman Act been proven. For example, ITT offers absolutely

27. This judicial practice of considering the degree of agency regulation in passing on antitrust arguments refutes ITT's proposition that it is not significant that the Telegraph Company is regulated by the FCC (ITT Brief at 42). Indeed, the cases cited by ITT in support of this proposition hold only that agency regulation does not remove a reviewing court's antitrust jurisdiction. This does not mean, however, that the degree of regulation by the agency over the regulated company is not to be considered by the court in weighing the antitrust argument. *See Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963); *California* v. *F.P.C.*, 369 U.S. 482 (1962); *United States* v. *Radio Corp. of America*, 358 U.S. 334 (1959).

no proof of the relevant market, apparently assuming that the relevant market is the Hawaii Mailgram market. The definition of the product market is a basic and complex issue in an antitrust case, requiring a detailed factual analysis of such matters as the uses of the service and the cross-elasticity of demand for the service in relation to other services. *See United States* v. *E. I. DuPont DeNemours & Co.*, 351 U.S. 377, 394-403 (1956).

Moreover, ITT's claim overlooks the fact that the offense of monopoly under Section 2 of the Sherman Act does not include "growth or development as a consequence of a superior product . . ." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). This is significant here, because the likely impetus for the IRCs' opposition to the Telegraph Company's Hawaii Mailgram application is their fear that this Telegraph Company service will be as successful in Hawaii as it has been in the remainder of the United States.

ITT also has not proven an attempt to monopolize on the part of the Telegraph Company. An attempt to monopolize requires proof of a specific intent to monopolize and a dangerous probability of monopolization. *See Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951).

Regarding the dangerous probability of monopolization, ITT, again, has offered no proof of the relevant market. *See Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965). Additionally, the FCC specifically found that no potential for abuse exists in the Telegraph Company's furnishing of Mailgram service to Hawaii (A22; A56). Furthermore, the fact that the Justice Department favored removal of the Section 222(c)(2) divestment requirement in 1962 (S. Rep. No. 1982, 87th Cong., 2d Sess. at 6-7 (1962)), shows that it was not concerned about any harmful effect on competition resulting from the Telegraph Company's continued operation of both its international and domestic telegram operations.

Nor has an intent to monopolize been proven, for the only evidence offered by ITT in this regard was that the Telegraph Company had opposed before the FCC certain interconnecting arrangements proposed by the IRCs. But, if such activity could be deemed to constitute an attempt to monopolize, the IRCs, which are acting in concert in this Review Proceeding and otherwise to prohibit competition by the Telegraph Company, would also be guilty of an antitrust violation.

CONCLUSION

For all of the reasons hereinabove set forth, the Memorandum Opinion and Order under review in the present Review Proceeding should in all respects be affirmed.

Dated: April 6, 1976

Respectfully Submitted,

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ADDENDUM: FULL TEXT OF STATUTES PRIMARILY INVOLVED

Section 222 (a), (b), (c) and (e) of the Communications Act of 1934, as amended, 47 U.S.C. § 222 (a), (b), (c) and (e)

§222. Consolidations and mergers of telegraph carriers

(a) As used in this section—

(1) The term "consolidation or merger" includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise.

(2) The term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(3) The term "international telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(4) The term "consolidated or merged carrier" means any carrier by wire or radio which acquires or operates the properties and facilities unified and integrated by consolidation or merger.

(5) The term "domestic telegraph operations" includes acceptance, transmission, reception, and delivery of record

communications by wire or radio which either originate or terminate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland, and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of destination within, the continental United States with respect to record communications by wire or radio which either originate or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: *Provided,* That nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States.

(6) The term "international telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, but does not include acceptance, transmission, reception, and delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into, and

points of destination within, the continental United States with respect to such communications, or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

(7) The terms "domestic telegraph properties" and "domestic telegraph facilities" mean properties and facilities, respectively, used or to be used in domestic telegraph operations.

(8) The term "employee" or "employees" (i) shall include any individual who is absent from active service because of furlough, illness, or leave of absence, except that there shall be no obligation upon the consolidated or merged carrier to reemploy any employee who is absent because of furlough, except in accordance with the terms of his furlough, and (ii) shall not include any employee of any carrier which is a party to a consolidation or merger pursuant to this section to the extent that he is employed in any business which such carrier continues to operate independently of the consolidation or merger.

(9) The term "representative" includes any individual or labor organization.

(10) The term "continental United States" means the District of Columbia and the States of the Union, except Hawaii.

(b) (1) It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier: *Provided,* That, except as provided in para-

graph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Commission as hereinafter provided, the consolidated or merged carrier may acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

(c) (1) Whenever any consolidation or merger is proposed under subsection (b) of this section, the telegraph carrier or telegraph carriers seeking authority therefor shall submit an application to the Commission, and thereupon the Commission shall order a public hearing to be held with respect to such application and shall give reasonable notice thereof, in writing, and an opportunity to be heard, to the Governor of each of the States in which any of the physical property involved in such proposed consolidation or merger is situated, to the Secretary of State, the Secretary of Defense, the Attorney General of the United States, representatives of employees where represented by bargaining representatives known to the Commission, and to such other persons as the Commission may deem advisable. If, after such public hearing, the Commission finds that the proposed consolidation or merger, or an amended proposal for consolidation or merger, (1) is authorized by subsection (a) of this section, (2) conforms to all other applicable provisions of this section, (3) is in the public interest, the Commission shall enter an order approving and authorizing such consolidation or merger, and thereupon any law or laws making consolidations and mergers unlawful shall not apply to the proposed con-

solidation or merger. In finding whether any proposed consolidation or merger is in the public interest, the Commission shall give due consideration, among other things, to the financial soundness of the carrier resulting from such consolidation or merger.

(2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can.

* * *

(e) (1) In the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, except as provided in paragraph (2) of this subsection, distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided, however,* That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in

accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection.

(2) In the case of any consolidation or merger pursuant to this section of telegraph carriers which immediately prior to such consolidation or merger, interchanged traffic with telegraph carriers in a contiguous foreign country, the consolidated or merged carrier shall distribute among such foreign telegraph carriers, telegraph traffic by wire or radio destined to points in such contiguous foreign country and shall divide the charges therefor, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: *Provided, however,* That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection. As used in this paragraph, the term "contiguous foreign country" means Canada, Mexico, or Newfoundland.

(3) Whenever, upon a complaint or upon its own initiative, and after a full hearing, the Commission finds that any such distribution of telegraph traffic among telegraph carriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraph traffic, or the division of charges therefor, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers.

(4) For the purposes of this subsection, the international telegraph operations of any domestic telegraph carrier shall be considered to be the operations of an independent international telegraph carrier, and the domestic telegraph operations of any international telegraph carrier shall be considered to be the operations of an independent domestic telegraph carrier.

* * *

Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214

§214. Extension of lines; certificate of public convenience and necessity; discontinuance of service

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity

will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not

before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

cited, to "make available, so far as possible, to all the people

AFFIDAVIT OF
SERVICE BY MAIL

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I, JOSEPH H. STALLINGS, hereby certify that the foregoing Brief of Intervenor State of Hawaii was served this 6th day of April, 1976, by mailing copies thereof, postage prepaid, to the following persons at the addresses shown below:

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Commission Expires March 30, 1977

474 F.2d 724, 731 (2d Cir. 1973).

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